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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

NO._____

STATE OF GEORGIA,
Petitioner

v.

THOMAS RACHEL, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The State of Georgia, Petitioner herein, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on March 5, 1965, rehearing denied on April 19, 1965, reversing the judgment of the United States District Court for the Northern District of Georgia, dated February 18, 1964, in which the District Court remanded to Fulton Superior Court twenty State of Georgia criminal prosecutions which had theretofore been removed to said District Court under the purported authority of the Civil Rights

Acts (28 U.S.C. 1443). The judgment sought to be reviewed reversed the remand order of the District Court in a divided opinion, two judges dissenting in part and concurring in part, and remanded the criminal prosecutions to the District Court with directions. A rehearing was denied by the same divided opinion of the same three judges of the Fifth Circuit panel which entered the judgment of March 5, 1965.

OPINIONS BELOW

The pertinent opinions of Courts below which affect the issues sought to be reviewed are as follows:

The opinion of the District Court dated February 18, 1964 is not reported, and appears in Appendix A, *infra*, Pages 1-6. An order of the Court of Appeals dated March 12, 1964, staying the remand order of the District Court, one judge dissenting, is not reported, and appears in Appendix B, *infra*, Pages 7-8. The opinion of the Court of Appeals dated March 5, 1965, two judges dissenting in part and concurring in part, is reported at 342 F. 2d 336, and appears in Appendix C, *infra*, Pages 9-28. The *per curiam* opinion of the Court of Appeals, one judge dissenting and another judge dissenting in part and concurring in part, dated April 19, 1965, denying a rehearing is not reported at this time, and appears in Appendix D, *infra*, Pages 29-30.

JURISDICTION

The opinion of the Fifth Circuit Court of Appeals was entered on March 5, 1965 (Appendix C, *infra*, Pages 9-28) and the judgment was entered on March 5, 1965 (Appendix F, *infra*, Page 42). The opinion-order of the Court of Appeals denying a rehearing was entered

on April 19, 1965 (Appendix D, *infra*, Pages 29-30). A 30-day Stay of Mandate was granted by the Court of Appeals on April 27, 1965 (App. G, Page 44). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

I. Whether a Notice of Appeal from an order of remand of the District Court entered in twenty State Court criminal prosecutions theretofore removed to said District Court under the purported authority of 28 U.S.C. 1443 is timely, where said Notice of Appeal was not filed within ten days from the entry of said remand order, as required by Rule 37 (a)(2), Fed. R. Crim. P.

Other subsidiary questions fairly comprised within Question I are:

(a) Did the majority of the Court of Appeals err in holding that the ten day time limit for filing a notice of appeal prescribed by Rule 37 (a) (2), Fed. R. Crim. P., has no application to this case because, as held by the majority of the Court, that Rule applies only to criminal appeals after verdict, or finding of guilt, or plea of guilty?

(b) Is not Rule 37 (a) (2) specifically made applicable to an appeal of a remand order entered in a removed criminal case by the provision of Rule 54 (b) (1), Fed. R. Crim. P. that the Criminal Rules apply to criminal prosecutions removed to the United States District Courts from state courts and govern all procedure after removal, except dismissal?

(c) Did the Court of Appeals have jurisdiction to

entertain the appeal where the Notice of Appeal of the order of remand was filed sixteen days after the entry of the remand order, and should not Petitioner's timely Motion to Dismiss Appeal on the grounds that the Notice of Appeal was not timely filed have been granted?

II. Assuming *arguendo* that Question I is decided adversely to Petitioner and the merits of the judgment of the Court of Appeals is reached, the following question is presented: Whether the Petition for Removal, which does not allege that any Georgia statute is unconstitutional and does not specifically allege a denial of the equal rights of the Respondents by virtue of the State statute under which they were being prosecuted in the State Court, sets forth a valid ground for removal under Section 1443, Title 28, U.S.C.

Other subsidiary questions fairly comprised within Question II are:

(a) Did the Court of Appeals err in holding that a Petition for Removal need contain only the "bare bones allegation of the existence of a right"; that the instant Petition for Removal did in fact allege the denial of protected rights by State legislation; and that the Petition for Removal adequately alleged that the Respondents suffered a denial of equal rights by virtue of the statute under which they were being prosecuted in the State Court?

(b) Whether the Respondents are entitled to a hearing in a federal forum for the purpose of proving a denial of their rights under a law providing for their equal rights because of State legislation, under the meager allegations of the "notice-type" pleading in their Petition

for Removal, and whether the District Court erred in remanding said cases to the State Court upon consideration of the allegations of the Petition for Removal alone, without ordering an evidentiary hearing.

III. Whether the majority of the Court of Appeals erred in reversing the remand order of the District Court and remanding the cases to said District Court with directions to hold a hearing, and in further holding that, if, upon such a hearing, it is established that the removal of the Respondents from the various places of public accommodation was done for racial reasons, it would become the duty of the District Court to order a dismissal of the prosecutions without further proceedings, under the holding of *Hamm* v. *City of Rock Hill*, 1964, 379 U. S. 306, 85 S. Ct. 384.

Other subsidiary questions fairly comprised within Question III are:

(a) Did the aforesaid directions by the majority of the Court of Appeals to the District Court misconstrue and expand the doctrine of *Hamm, supra,* to mean that all criminal prosecutions arising from removal of persons for racial reasons from places of public accommodation must be abated, without regard to any possible evidence as to the peaceful or nonpeaceful conduct of the particular Respondents involved, and did the aforesaid directions unduly limit the discretion of the District Court in deciding whether the *Hamm* decision was controlling or was distinguishable on other grounds based on the possible evidence adduced at the hearing?

(b) Did the majority of the Court of Appeals err in

remanding the case to the District Court with the directions aforesaid, without requiring the removing Respondents to prove in the hearing that the teachings of *Hamm* would not be applied fairly to them by the Georgia Courts if the prosecutions were remanded to the State courts?

(c) Did the majority of the Court of Appeals err in failing to affirm the District Court's order of remand, thus allowing the Courts of Georgia to apply the doctrine of the *Hamm* decision, rendered subsequent to the removal of these cases, to these prosecutions?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First and Fourteenth Amendments to the Constitution of the United States of America are involved.

The statutes involved are the following:

(1) Sections 1443 (1) (2); 1446 (a), (c), (d); and 1447 (c) and (d), Title 28, U. S. C. (62 Stat. 938, 1948; 63 Stat. 102, 1949).

(2) Former Sections 71, 74, 76, former Title 28, U. S. C. (March 3, 1911, 36 Stat. 1094, 1096, 1097).

(3) Act of 1866 (14 Stat. 27, 28).

(4) Act of 1875 (18 Stat. 470, 472).

(5) Act of 1887 (24 Stat. 553, 555).

(6) Georgia Code Annotated, 26-3005 (Ga. Laws 1960, pages 142 and 143).

(7) Rules 37 (a) (2), 54 (a) (b) (1) and 45 (a), Title 18, U. S. C.

(8) Rule 73 (a), Title 28, U. S. C.

(9) Revised Statutes, Title XIII, the Judiciary, Sec. 641.

(10) Civil Rights Act of 1964, Secs. 201 (b) (2) and 203.

(11) Act of June 25, 1948, codifying and enacting Title 18, U. S. Code c. 645, 62 Stat., 683, page 845.

The constitutional provisions and statutes involved being somewhat lengthy, their pertinent text is set out in Appendix E for Petitioner, as authorized by Rule 23 (1) (d) of this Court, Pages 31-41.

STATEMENT OF THE CASE

On August 2, 1963, a Grand Jury of Fulton Superior Court, Atlanta, Georgia, indicted Thomas Rachel and 19 other defendants in separate indictments for violations of Georgia Laws, 1960, pages 142 and 143, a misdemeanor. This statute is codified as 26-3005, Georgia Code Annotated (App. E, Page 40).

The misdemeanor with which Thomas Rachel was charged was his failure and refusal, on June 17, 1963, to leave the premises of another, to-wit, Lebco, Inc., doing business under the name of Lebs on Luckie Street after having been requested to leave said premises by the person in charge.

The indictments returned against the other 19 defendants, who are now Respondents herein, involved here contained identical allegations to the Rachel indictment with the exception that in some instances the misdemeanor was alleged to have been committed on another date and at a different restaurant in Fulton County, Georgia.

On February 17, 1964, the Respondent Rachel and the 19 other Respondents filed a Petition for Removal in the United States District Court for the Northern District of Georgia, under the purported authority of Sections 1443 (1) (2) and 1446, Title 28, U. S. C. (R. 2-9)

Briefly stated, the removal petition alleged that the State of Georgia by statute was perpetuating customs and serving members of the Negro race in places of public accommodation on a racially discriminatory basis, and on terms and conditions not imposed on the white race. They further alleged that they were being prosecuted for acts done under color of authority derived from the Constitution and laws of the United States, and for refusing to do an act inconsistent therewith. (R. 2-9)

The next day after filing of the removal petition, i.e., on February 18, 1964, United States District Judge Boyd Sloan issued an opinion and order remanding said cases to Fulton Superior Court, stating in part, "the petition for removal to this Court does not allege facts sufficient to justify the removal which has been effected." (R. 10-15; App. A, Pages 1-6.)

On March 5, 1964, the Respondents filed a Notice of Appeal from the order of remand to the Fifth Circuit Court of Appeals. (R. 16)

The Respondents filed with the Fifth Circuit Court of Appeals a Motion for Stay Pending Appeal, on March 12, 1964.

On March 12, 1964, a hearing was held before a three Judge panel of the Fifth Circuit Court of Appeals on

the motion for stay of the remand order of the District Court. Petitioner, the State of Georgia, filed a Motion to Dismiss Appeal on two grounds. (1) that the remand order of the District Court was not reviewable on appeal or otherwise, and (2) the Notice of Appeal was not timely filed, having been filed more than ten days from the date of the remand order. (R. 26-30)

After an oral hearing, the majority of the Fifth Circuit Court of Appeals by a 2 - 1 division granted the stay. District Judge G. Harrold Carswell, Northern District of Florida, dissented, saying, "I would, therefore, grant appellee's motion to dismiss." (App. B, Pages 7-8)

Thereafter, after extensive oral argument before the Court of Appeals, said Court on March 5, 1965, entered an opinion by a divided three-judge Court reversing the judgment of the District Court, and remanding the case to the lower Court with instructions to hold a hearing and to dismiss the prosecutions, if it is established that the removal of the Respondents from the various places of public accommodation was done for racial reasons. (R. 42-61; App. C, Pages 9-28) Two Judges dissented in part and concurred in part.

A timely Petition for Rehearing En Banc was filed by the State of Georgia, Petitioner (R. 63-78) and was denied in a *per curiam* opinion of the Court of Appeals entered on April 19, 1965, with one Judge dissenting and another Judge dissenting in part and concurring in part (R. 79-80; App. D, Pages 29-30). A 30-day Stay of Mandate was granted by the Court of Appeals on April 27, 1965 on application of Petitioner pending submission of this Petition for Writ of Certiorari. (Appendix G, Page 44)

The jurisdiction of the Court of first instance, the United States District Court for the Northern District of Georgia, was invoked by the removing Respondents under the purported authority of Sections 1443 and 1446 (c) (d), Title 28, U.S.C. (R. 6, 7)

SUMMARY OF ARGUMENT

Only three very basic and important reasons for granting the Writ are urged by Petitioner. First, the Court of Appeals had no jurisdiction to consider the appeal, inasmuch as the Notice of Appeal of the order of remand was filed six days too late. The majority of the Court of Appeals has held, in the first opinion known to counsel for Petitioner since the 1948 enactment of Title 18, U.S.C., that the ten-day time limit of Rule 37 (a) (2), Fed. R. Crim. P. for filing a notice of appeal from an order in a criminal case applies only to criminal appeals after verdict, or finding of guilt, or plea of guilty. This novel construction of one of the basic Criminal Rules originally promulgated by this Honorable Court and subsequently incorporated by reference in an Act of Congress in 1948, alone would warrant the granting of the Writ. One Judge of the panel dissented on this ground alone both in the opinion on the merits and on the petition for rehearing. This construction of the Rule was never urged by the Respondents in their briefs or argument before the Court of Appeals.

Secondly, the Petition for Removal completely fails, according to all federal judicial precedent, to set out a valid ground for removing State prosecutions to a federal district court for trial. Petitioner urges that there is no requirement for a hearing of the allegations of the removal petition and that removability must stand or fall

upon the allegations of the petition. All federal case precedent, including that of this Honorable Court, support this position, and Petitioner strongly maintains that no error was committed by the District Court in remanding the cases without an evidentiary hearing.

Finally, even if Petitioner's first two grounds are decided adversely to us, the Writ should be granted because the majority of the Court of Appeals has directed the District Court to look for only one criteria on the hearing, and to dismiss the *State Court prosecutions* if that single element is found from the evidence. That element is, of course, the finding that racial reasons were the cause of the removal of the *Rachel, et al,* defendants from the various restaurants. This virtual mandate to the District Court unduly limits his judicial discretion in considering whether or not the prosecutions are in fact controlled by *Hamm,* supra. Many distinguishing factors might be raised by the evidence on such a hearing. Were the defendants peaceable and non-violent in their demonstrations? Were the restaurants places of public accomodation coming under the purview of the Civil Rights Act of 1964? Under the directions of the Court of Appeals, the District Court could consider none of these factors, if the racial factor alone were found.

Further, the Court of Appeals by its remand to the District Court with directions ignores the fact that the Supreme Court of Georgia has recognized and followed the *Hamm* decision and has abated five similar State Court prosecutions. *Bolton, et al* v. *State of Georgia,* 220 Ga. 632, decided February 8, 1965. The *Hamm* case had not been decided when these (*Rachel, et al*) prose-

cutions were pending in the Georgia Courts, and the Georgia Courts have not had an opportunity to consider these cases in connection with the *Hamm* doctrine. They should be afforded that opportunity, as pointed out by Circuit Judge Bell in his partial dissent (R. 60, App. C., Page 27). The action of the majority of the Court of Appeals amounts to a finding that the Courts of Georgia will not apply *Hamm* fairly to these Respondents before such courts have even been given the opportunity to do so. This casual treatment of the Georgia Courts involves jeopardy to our dual system of courts, state and federal, as pointed out by Circuit Judge Bell. Petitioner feels that, if these cases are remanded to the District Court for a hearing, contrary to Petitioner's other grounds, *at the very least* these Respondents should be required to prove that the Georgia Courts will not treat them fairly, in the light of *Hamm*. If they cannot prove this, the cases should be remanded to the State Courts. The District Court should not have its hands tied by the erroneous directions of the majority of the Court of Appeals, in limiting the hearing to one issue only.

Counsel for Petitioner are not concerned in this petition with the merits of the State Court prosecutions against these Respondents, and as to the eventual outcome of same if they are remanded to the State Courts. We *are* deeply concerned with the grave and highly important constitutional question of whether a federal appellate court should accept jurisdiction over State Court criminal prosecutions and virtually order dismissal of the actions, without ever giving the State Courts a chance to reconsider the cases in the light of the latest decision from this Honorable Court. Particularly is this so in view of the *Bolton* decision by the highest Court

of Georgia, which proves conclusively that Georgia Courts are following the decisions of the United States Supreme Court in racial controversies.

For the foregoing reasons, Petitioner respectfully insists that the Petition for Writ of Certiorari to the Fifth Circuit Court of Appeals should be granted.

REASONS FOR GRANTING THE WRIT

I. The Notice of Appeal of the Remand Order was not timely filed, and Petitioner's timely Motion to Dismiss Appeal should have been granted.

The majority of the Court of Appeals, with Judge Whitehurst dissenting, held that Rule 37 (a) (2) applies only to criminal appeals "after verdict, or finding of guilt . . . or plea of guilty," citing *Nye* v. *United States*, 1941, 313 U. S. 28, 43-44. Therefore, the Court held that the notice of appeal was timely, even though filed sixteen days after entry of the remand order. Petitioner respectfully maintains that this was erroneous.

(a) Rule 37 (a) (2) controls the time limit for filing a notice of appeal in a criminal case both before and after verdict.

The language of Rule 37 (a) (2), which is a single paragraph, clearly refutes the reasoning of the Court of Appeals. The last sentence allows 30 days for an appeal by the government when authorized by statute. The government may appeal *before verdict* in criminal cases (1) an order suppressing evidence in a narcotics case. (18 U.S.C. 1404) and (2) a decision dismissing an indictment or sustaining a motion in bar, *where the defendant has not been put in jeopardy*. (18 U.S.C. 3731.)

Only in rare instances where a judgment of conviction has been arrested based on invalidity or construction of the statute can the government appeal *after* verdict in a criminal case. If Rule 37 (a) (2) applies only to "after verdict" judgments and orders, why does the last sentence of that Rule deal with the government's "before verdict" appeals? The ruling of the Court of Appeals makes the last sentence of that Rule a complete nullity. It splits a single paragraph into two parts — the first dealing with "after verdict" appeals by defendants and the latter prescribing a different time limit for both "before" and "after" verdict appeals by the government. This is a far-fetched construction of the Rule, and one which was never urged even by the Respondents before the Court of Appeals.

The *Nye* case, supra, is not controlling. It was decided in 1941, and was not a criminal case, but an adjudication of criminal contempt arising out of a civil case. The main thrust of the decision was that "the categories of cases embraced in the rules cannot be expanded by interpretation to include this type of case." 313 U. S. at Page 45. In *Nye*, the Court was interpreting Rule III, effective September 1, 1934 (292 U. S. 661) under the "after verdict" enabling Act of February 24, 1933, (c. 119, 49 Stat. 904, as amended). Since that time, the Old Rule III has been superseded by Rule 37, prepared by the Advisory Committee of this Court which also prepared Rules 1-31, 40-60. This Court by order dated February 6, 1946, directed that all the Rules (1 through 60) be consecutively numbered, indexed, and given their title. 327 U. S. 827. It is inconceivable that the Advisory Committee would have left Rules 32-39 applicable only to "after verdict" judgments while balance of the Rules

applied to both "before" and "after" verdict judgments, or that this Court in promulgating all of the Rules in the same order intended any such result.

Finally, the Court of Appeals based its ruling in large part on the assertion that Rule 37 (a) (2) had never been presented to Congress. The Court of Appeals overlooked the fact that when Congress enacted the Act of June 25, 1948, (c. 645, 62 Stat. 683) entitled "An Act to Revise, Codify, and Enact into Positive Law Title 18 of the United States Code" on page 845 of that statute, under Section 3732, Rule 37 (a) is incorporated by reference. (See Appendix E, Page 41.)

Finally, we point out that the Court of Appeals, while holding that Rule 37 (a) (2) was not applicable, failed to state in its opinion what other Rule or statute would control the time limit for a notice of appeal in the instant case. Certainly we cannot go to the Federal Rules of Civil Procedure for an answer, because this is not a civil case.

(b) Rule 54, (a) (1), (b) (1), Fed. R. Crim. P. specifically makes Rule 37 (a) (2) applicable to the instant case.

The first sentence of Rule 54 (a) (1) makes "these rules" applicable to *all* criminal proceedings in the United States District Courts. Rule 54 (b) (1) specifically provides that "these rules" apply to criminal prosecutions removed to U. S. district courts from state courts and "govern all procedure after removal" except dismissal. (Appendix E, Page 40.) The phrase "govern *all* procedure after removal" must certainly include appeal of remand orders. No remand order can issue until after

a case is removed from state to federal court. Rule 54 was promulgated by this Court on the same day as Rule 37, as previously pointed out. Therefore, counsel for Petitioner insist that to hold that Rule 37 does not apply to an appeal of a remand order in a criminal case flies into the teeth of Rule 54, both generally and specifically. Rule 54 in its broad application applies the Criminal Rules to *all* criminal proceedings in district courts and then in precise language applies the Rules to this exact type of case.

(c) For the foregoing reasons, the Court of Appeals erred in holding this appeal to be timely. A notice of appeal in a criminal case not filed within the ten-day time limit prescribed by Rule 37 (a) (2) confers no jurisdiction upon the Court of Appeals. *United States* v. *Robinson*, 1960, 361 U. S. 220; *Berman* v. *United States*, 1964, 378 U. S. 530. Therefore, Petitioner's timely Motion to Dismiss Appeal should have been granted.

II. The Petition for Removal does not set out any valid ground for removal.

(a) There is nothing in the Petition for Removal to warrant the exercise of Federal jurisdiction.

Petitioner respectfully maintains that the Petition for Removal is completely devoid of any valid ground for removal of these criminal prosecutions from State to Federal court. What it *does not contain* is more important than the skimpy allegations set forth. The Petition for Removal (R. 2-7) does *not* allege (1) that any statute or law of the State of Georgia is unconstitutional (2) that any civil right, or the enforcement thereof, of Respondents is destroyed by any statute of the State of

Georgia or by its Constitution (3) that any statute of the State of Georgia, or its Constitution creates an inability on the part of Respondents to enforce in the Courts of Georgia their equal civil rights under the United States Constitution.

Furthermore, there is a complete failure in the Petition for Removal to set out sufficient *facts* to support a removal. Only bare allegations are made that certain Respondents sought service, food, entertainment and comfort in certain restaurants and hotels in Atlanta, Georgia, and were arrested pursuant to Georgia Code Annotated 26-3005. Then appears a mere conclusionary allegation that these arrests were effected for the sole purpose of perpetuating customs and usages of the City of Atlanta with respect to serving and seating Negroes, and white persons accompanying Negroes, in places of public accommodation upon a racially discriminatory basis. They allege, in a pure conclusion, that they cannot enforce their rights in the Georgia courts, but do not allege a single *fact* showing why they cannot do so. They do not specify one single Georgia law which prevents enforcement of their rights in the State courts. Moreover, they do not allege that any judge, law enforcement officer, prosecuting attorney, or other officer of the State of Georgia has in any way violated any of their civil rights, or prevented them from asserting any of such rights. In other words, there is no allegation of improper conduct by any State official. Even if such allegations *were* contained in the Petition for Removal, many federal decisions hold that such allegations would not justify removal. This woefully inadequate removal petition was everything that the District Court had before him when he considered, on his own motion as it was his duty

to do, the question of whether a cause for removal was shown.

Petitioner will discuss briefly just a few of the controlling cases which illustrate beyond the shadow of a doubt that this case is not removable under any possible construction of the Petition for Removal.

In *Virginia* v. *Rives,* 1879, 100 U. S. 313, where two Negroes removed their pending State trial for murder to federal court, and the State of Virginia filed a petition for mandamus to the United States Supreme Court to force the remand of said cases, Justice Strong said, in part, for the Court, in granting the petition for mandamus:

> "... *But in the absence of constitutional or legislative impediments he cannot swear before his case comes to trial that his enjoyment of all his civil rights is denied to him.* When he has only an apprehension that such rights will be withheld from him when his case shall come to trial, he cannot affirm that they are actually denied, or that he cannot enforce them. Yet such an affirmation is essential to his right to remove his case. By the express requirement of the statute his *petition must set forth the facts upon which he bases his claim to have his case removed,* and not merely his belief that he cannot enforce his rights at a subsequent stage of the proceedings. The statute was not, therefore, intended as a corrective of errors or wrongs committed by judicial tribunals in the administration of the law at the trial." (Emphasis added)

Virginia v. *Rives,* supra, holds categorically that a case is not removable under the civil rights acts (the predecessor of 28 U.S.C. 1443) unless a State Constitution or Statute on its face denies the removing defendant his

federal constitutional rights. In other words, there must be *discriminatory state legislation* depriving him of those rights before he can remove the case. Since that time, federal courts have followed that rule without deviation or modification. To list just a few, Appellee cites *Kentucky* v. *Powers*, 1906, 201 U. S. 1; *Williams* v. *Mississippi*, 1898, 170 U. S. 213; *Murray* v. *Louisiana*, 1896, 163 U. S. 101; *Gibson* v. *Mississippi*, 1896, 162 U. S. 565; *Smith* v. *Mississippi*, 1896, 162 U. S. 592; *Hull v. Jackson County Circuit Court*, 6 Cir., 1943, 138 F. 2d 820; *Snypp* v. *Ohio*, 6 Cir. 1934, 70 F. 2d 535, cert. den. 293 U. S. 563; *Arkansas* v. *Howard*, D.C. E.D. Ark., 1963, 218 F. Supp. 626; *North Carolina* v. *Jackson*, D.C. M.D. N.C., 1955, 135 F. Supp. 682; *Hill* v. *Pennsylvania*, D.C. W.D. Pa., 1960, 183 F. Supp. 126; *Texas* v. *Doris*, D.C. S.D. Texas, 1938, 165 F. Supp. 738; and *Neal* v. *Delaware*, 1880, 103 U. S. 370. Each of the foregoing was a criminal case, and removal was sought in each under the civil rights acts.

The *Kentucky* v. *Powers* case, supra, appears to be the last Supreme Court ruling on exactly what grounds will authorize a removal under color of the civil rights acts, and it has been followed in every instance by the lower federal courts in the cases previously cited in this section of this Petition. In *Powers*, supra, the Supreme Court said, (201 U. S. at page 30):

> "The question as to the scope of section 641 of the Revised Statutes again rose in the subsequent cases of *Neal* v. *Delaware*, 103 U. S. 370, 386; *Bush* v. *Kentucky*, 107 U. S. 110, 116; *Gibson v. Mississippi*, 162 U. S. 565, 581, 584, and *Charley Smith* v. *Mississippi*, 162 U. S. 592, 600. In each of these cases it was distinctly adjudged, in harmony with previous

cases, that the words in section 641 — 'who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States' — did not give the right of *removal*, unless the constitution or the laws of the State in which the criminal prosecution was pending denied or prevented the enforcement in the judicial tribunals of such State of the equal rights of the accused as secured by any law of the United States. Those cases, as did the prior ones, expressly held that there was no right of *removal* under section 641, where the alleged discrimination against the accused, in respect of his equal rights, was due to the illegal or corrupt acts of administrative officers, unauthorized by the constitution or laws of the State, as interpreted by its highest court. For wrongs of that character the remedy, it was held, is in the state court, and ultimately in the power of this court, upon writ of error, to protect any right secured or granted to an accused by the Constitution or laws of the United States, and which has been denied to him in the highest court of the State in which the decision, in respect of that right, could be had."

Petitioner maintains that the *Powers* case still controls the federal case law on this question of removability, and that it has not been altered, modified, or watered-down by any subsequent decision of the Supreme Court, or any inferior federal court.

Thus, Petitioner has clearly shown that according to prevailing federal case law *discriminatory state legislation* which *interferes* with a constitutional right of defense by the defendant must exist before a case is removable

under the civil rights acts. The Respondents' Petition for Removal does not allege this. The only statute they mention is Georgia Code Annotated, 26-3005, which simply makes it unlawful for any person who is on the premises of another to refuse and fail to leave said premises when requested to do so by the owner or other person in charge of said premises. There is nothing discriminatory about that statute, and nothing which in any manner deprives a defendant of any right of defense. The statute on its face has application to many situations other than racial ones. It authorizes prosecution of the drunken visitor in one's home, the person behaving in a disorderly manner in one's church, or the disreputably dressed, boisterous customer in a store, who refuses to leave when requested. If the gist of Respondents' complaint is that 26-3005 is being *unconstitutionally applied*, then they have no grounds for removal. Their remedy is to defend themselves through the State courts and then seek review by certiorari in the United States Supreme Court.

The Court of Appeals in their opinion impliedly recognize the lack of sufficient allegations in the removal petition. The majority refers to "the bare bones allegation of the existence of a right," and to "liberality of pleadings under the (Civil) rules." Circuit Judge Bell refers in his partially concurring and partially dissenting opinion to the removal petition as "notice type pleadings." In fact, the whole Court agreed to send the case back to the District Court to allow Respondents to prove the allegations of the removal petition, or as Judge Bell stated "to determine just what appellants do claim." (R. 60, App. C, Page 27.)

Finally, we direct the Court's attention to the very able, thorough and scholarly opinion of United States District Judge Clayton, Northern District of Mississippi, in *City of Clarksdale, Miss.* v. *Gertge,* 1964, 237 F. Supp. 213, in which he remanded to the State courts a removed prosecution arising from racial incidents in which the removal petition was far more detailed as to alleged denial of federally protected rights in Mississippi courts than is the removal petition in the instant case. Judge Clayton concluded that removal was not justified under either sub-section (1) or (2), of Section 1443, Title 28, U.S.C. He *did not hold a hearing,* but rendered his opinion on briefs directed to the *face of the pleadings.* His opinion in that case is even more applicable to the instant case, where the removal petition is so much more inadequate.

(b) The removal petition must stand or fall upon its allegations alone, and there is no requirement for a district court to hold an evidentiary hearing.

The Court of Appeals held that the district court should have held a hearing, to allow the Respondents to prove their allegations and remanded the case to the District Court for such a hearing. Petitioner maintains that this was error. We find no legal precedent for such action. Removal petitions are considered on their face, by the factual allegations.

In *Maryland* v. *Soper, Judge,* (No. 1) 1925, 270 U. S. 9, the Supreme Court said:

> "We think the *averments of the amended petition* in this case are not sufficiently informing and specific to make a case for removal under Sec. 33." (at page 34)

. . . . . .

"*These averments* amount to little more than to say that the homicide on account of which they are charged with murder was at a time when they were engaged in performing their official duty . . . (at page 35) . . . . . .

". . . But they (the removing defendants) should do more than this in order to satisfy the statute (Section 33, Judicial Code, formerly Section 643, Revised Statutes). In order to justify so exceptional a procedure (removal of criminal cases to federal court), the person seeking the benefit of it should be candid, specific, and positive in explaining his relation to the transaction growing out of which he has been indicted, and in showing that his relation to it was confined to his acts as an officer. As the defendants *in their statement* have not clearly fulfilled this requirement, *we must grant the writ of mandamus directing the District Judge to remand the indictment and prosecution*. Should the District Judge deem it proper *to allow another amendment to the petition for removal*, by which the *averments necessary* to bring the case within Sec. 33 are supplied, he will be at liberty to do so. Otherwise the prosecution is to be remanded as upon a peremptory writ." (Italics and explanatory words in parenthesis added.)

Petitioner thus maintains that the removability of a case depends on the allegations of the removal petition itself. For example, in *Birmingham* v. *Croskey*, D.C. N.D. Ala., 1963, 217 F. Supp. 947, the Courts' opinion does not mention *any* evidentiary hearing, and reads in brief portions as follows (217 F. Supp. 950-51):

"As will become readily apparent, the foregoing *allegations* (of the removal petition) are insufficient to justify the removal of the case to this Court" (at page 950) and "Considered in the light of the

> aforementioned authority, the *petition for removal* to this Court *does not allege* facts sufficient to justify the removal that has been granted" (at the bottom of page 950 and top of page 951).

In other cases where remand was ordered, the following excerpts illustrate our point:

> "The *petition* is probably insufficient also for the reasons, etc." (*North Carolina* v. *Jackson*, supra at page 683); "Otherwise stated, even if the *material factual allegations of the petition* are accepted at face value, the Court is not convinced, etc." (*Arkansas* v. *Howard*, supra, at page 633.)

Appellee could quote similar language from many other cases, showing that the allegations of the removal petitions are the only matters considered by federal district courts, and that evidentiary hearings are not required or even indicated, but we feel it is unnecessary.

If District Courts are required to hold prolonged and detailed hearings every time an inadequate removal petition is filed, the work load of such Courts will be greatly increased. Such petitions should be, and have been in the past, considered strictly in the light of the facts alleged therein. Therefore, the District Court properly remanded the case without a hearing.

III. Assuming arguendo that remand to the District Court for an evidentiary hearing was proper, the directions given the lower court were clearly erroneous.

The majority of the Court of Appeals directed the lower court to dismiss the prosecutions, if upon the hearing it appeared that racial reasons were the cause of Respondents' removal from the various restaurants.

No discretion whatever was left to the District Court by these directions, except to make a finding of fact as to that one issue.

(a) The aforesaid directions to the lower court unduly limited the judicial discretion of that Court in applying the evidence to the doctrine of Hamm v. City of Rock Hill.

As Circuit Judge Bell points out (App. C, Page 26; R. 59), such a holding is tantamount to applying *Hamm* in all its sweep against trespass statutes, retroactively to the State of Georgia, and is in effect a holding that Georgia has applied and will continue to apply its trespass statute contrary to the teachings of this Honorable Court in *Hamm*, even though *Hamm* had not been decided when the cases were in the State Courts, and even though those State Courts have not had an opportunity to deal with these cases in the light of *Hamm*.

This holding assumes that *any* trespass prosecution growing out of racial causes is automatically abated by *Hamm*. *Hamm* does not hold this. It is strictly limited to peaceful and non-violent attempts to exercise a right to be served in places of public accommodation, without regard to race, color or creed. A number of recent Supreme Court decisions have also stressed the peaceful and non-violent actions of defendants prosecuted in various types of "sit-in" demonstrations. These cases are *Thompson* v. *City of Louisville*, 1962, 362 U. S. 199; *Shuttlesworth* v. *City of Birmingham, Ala.*, 1963, 373 U. S. 262; *Peterson* v. *City of Greenville, S. C.*, 1963, 373 U. S. 244; and *Griffin* v. *Maryland*, 1964, 378 U. S. 130. If the evidence should show violence or vandalism

on the part of Respondents, *Hamm* would not be applicable.

Another issue which might arise from the evidence in a hearing is whether or not any one of the restaurants involved is in fact a place of public accommodation within the meaning of the Civil Rights Act of 1964. The District Court should be allowed to determine these matters upon the evidence, and not be restricted to one issue as he is at present under the majority decision of the Court of Appeals.

(b) The District Court's remand order should have been affirmed, and the criminal prosecutions returned to Fulton Superior Court, thus allowing the Courts of Georgia to consider the cases in the light of the Hamm decision.

Counsel for Petitioner respectfully submit that the Court of Appeals has gone one step further than this Honorable Court has ever done, in returning the cases to the District Court with directions to dismiss same if one specific finding, i.e., racial causes for the arrests of Respondents, is made. This wrests jurisdiction of the cases from the Georgia Courts without giving them a chance to apply the latest ruling of this Honorable Court. And there is not a single allegation in the Petition for Removal which indicates that the Respondents will not be treated completely fairly in the Georgia Courts, in the light of *Hamm*. Counsel for Petitioner agree with Circuit Judge Bell's opinion that Respondents should be required to show that Georgia Courts will not apply *Hamm* fairly to them. If they fail to do this, the cases should be remanded to the State courts.

Any possible conjecture that Georgia Courts will not fairly apply the doctrine of *Hamm* to any and all defendants similarly situated to these Respondents should have been laid to rest in the case of *Bolton* v. *State,* 1965, 220 Ga. 632. The Negro defendants in *Bolton,* supra, were convicted for violation of the same anti-trespass law involved in the instant case, for sitting down in, and refusing to leave a public eating place in Athens, Georgia, after having been refused service. The Supreme Court of Georgia, in reversing the convictions, said in part, in a unanimous opinion:

> ". . . So applying the rules of Sec. 201 (b) (2), (c) of the Civil Rights Act of 1964 to the facts of this case, we find and hold that this public eating place offers to serve interstate travelers and under the majority holding of the Supreme Court of the United States in *Hamm* v. *City of Rock Hill* (*South Carolina*), and *Lupper* v. *State of Arkansas,* 379 U. S. 306 (13 L.E. 2d 300), both of which were decided in one opinion on December 14, 1964, these convictions must be vacated and the prosecutions dismissed, notwithstanding the offense charged against each of these defendants was committed and convictions therefor were obtained prior to the passage of the Civil Rights Act of 1964. In those two cases the majority held that the Civil Rights Act of 1964 forbids discrimination in specified places of public accommodation and removes peaceful attempts to be served on an equal basis from the category of punishable activities. While those majority holdings do not accord with our conception of the meaning and purpose of the provisions of the Constitution of this State and the Constitution of the United States which prohibit the enactment of ex post facto or retroactive laws (Code Sec. 1-128, 2-302), we are, under our oaths, nevertheless required to follow them and we will therefore do so in these cases; and

being so required, *we therefore hold that these pending convictions are abated by the 1964 Civil Rights Act* and it is ordered that the sentences imposed on each of these defendants be vacated *and that the charge against each defendant be dismissed.*" (Italics added)

Counsel for Petitioner most respectfully insist that the Georgia Courts should be afforded an equal opportunity to rule on these cases, unless Respondents can show that their equal rights will be denied them in the Georgia Courts.

CONCLUSION

As stated in our summary of argument, counsel for Petitioner are not concerned in this case with the future of these cases if they are remanded to State courts. The issue of whether these cases are *removable to federal courts* and whether the appeal *was timely* are the only questions presented. We feel they are of sufficient importance to warrant the issuance of the Writ of Certiorari. To our knowledge, this is the first time the issue of removability of criminal prosecutions from State to federal court in light of the Civil Rights Act of 1964 has been presented to this Court. It is an important question of federal law which has not been, but should be, decided by this Honorable Court. The unusual construction by the Court of Appeals of one of the jurisdictional Rules of Criminal Procedure promulgated by this Court, (Rule 37 (a) (2)) is important enough alone to warrant the issuance of the Writ.

Finally, there has been a wide disparity of views of Federal Judges during the course of this case in the lower federal courts. The District Judge remanded the cases. One Judge dissented from the Order staying the

remand order. Two Judges dissented in part and concurred in part in both the opinion of the Fifth Circuit Court of Appeals on the merits, and in the opinion of that Court denying a rehearing. This Court should resolve these conflicting views with finality.

For the foregoing reasons, Petitioner respectfully urges this Court to grant the Petition for Writ of Certiorari and review the judgment of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX A

APPENDIX A — ORDER OF REMAND

(Filed in Clerk's Office February 18, 1964, B. G. Nash, Clerk. By: Mary Roper, Deputy Clerk.)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

NO. 23,869

THE STATE OF GEORGIA

v.

THOMAS RACHEL, JERRY WALKER, LARRY CRAWFORD FOX, DEBBIE AMIS, WILLIE PAUL BERRIEN, JR., LYNN PFUHL, MICHAEL SAYER, JULIAN M. SAMSTEIN, RALPH M. MOORE, RONALD FRANKLIN TURNER, CARL C. ARNOLD, JAMES F. THOMPSON, ARCHER COLUMBUS BLACK, CARL VINCENT HILL, JEANETTE STOCKTON HUME, JAMES ARTHUR CHERRY, RUSSELL C. CAMPBELL, ALLEN R. ELLIOTT, ANNA JO WEAVER, AND CHARLES EDWARD WELLS

CRIMINAL

In a petition for removal verified by counsel, filed in this Court on February 17, 1964, by the above named defendants, the petitioners allege:

That they are presently at liberty on bail on a charge of having violated Title 26, Georgia Code Annotated, § 3005; that they were arrested by members of the Police Department of the City of Atlanta and that "their

arrests were effected for the sole purpose of aiding, abetting, and perpetuating customs, and usages which have deep historical and psychological roots in the mores and attitudes which exist in the City of Atlanta with respect to serving and seating members of the Negro race in such places of public accommodation and convenience upon a racially discriminatory basis and upon terms and conditions not imposed upon members of the so-called white or Caucasian race. Members of the so-called white or Caucasian race are similarly treated and discriminated against when accompanied by members of the Negro race."

It is alleged that petitioner, William Paul Berrien, Jr., was arrested "when he sought lodging, food, service, entertainment and comfort at the H & G Corporation d/b/a Henry Grady Hotel" which is alleged to be a hotel facility open to the general public, built on real estate owned by the State of Georgia, but leased to said corporation. It is alleged that the other petitioners were arrested at specified privately owned restaurants and cafeterias in the City of Atlanta, all of the arrests being on specified dates in 1963 and it being alleged that all of petitioners were indicted by the July-August, 1963, Grand Jury of Fulton County, Georgia, for violation of said statute; that the cases are presently pending in the Superior Court of Fulton County, Georgia, and are set to be heard during the week of February 17 to February 22, 1964, "the first case to be called for trial at 9:30 A.M. on February 17, 1964."

Petitioners allege that this Court has jurisdiction to hear and try the charges presently pending against them by virtue of 28 United States Code Annotated § 1443

(1) (2); That removal is sought to protect rights guaranteed to petitioners under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States and to protect the right of free speech, association, and assembly guaranteed by the First Amendment to the Constitution of the United States; that "petitioners are prosecuted for acts done under color of authority from the constitution and laws of the United States and for refraining to do an act which was, and is, inconsistent with the Constitution and Laws of the United States;" that they are denied and/or cannot enforce in the courts of the State of Georgia the specified rights claimed under the Constitution and laws of the United States, "in that, among other things, the State of Georgia by statute, custom, usage, and practice maintains a policy of racial discrimination." Petitioners pray for removal of said criminal proceedings from the state court to this court for trial and "that said prosecutions stand so removed as provided for in Title 28, United States Code Annotated, Sec. 1446 (c) and (d)."

The criminal statute under which these movant defendants are indicted is § 26-3005 of the Georgia Code, which reads, as follows:

> "Refusal to leave premises of another when ordered to do so by owner or person in charge. — It shall be unlawful for any person, who is on the premises of another, to refuse and fail to leave said premises when requested to do so by the owner or any person in charge of said premises or the agent or employee of such owner or such person in charge. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be punished as for a misdemeanor."

The defendants do not here contend that this statute is unconstitutional. The Supreme Court of Georgia has recently held that this statute does not violate the due process clause of the federal constitution. [1]

It is the duty of the district court to examine on its own motion the question of whether a case removed to it should be remanded to the state court without waiting for a motion to remand. [2]

The removal statute — § 1443, Title 28, U. S. C. — is to be strictly construed. [3]

A criminal prosecution or a civil cause under this statute [28 U. S. C., § 1443] because of a civil right or the enforcement of such right must arise out of the destruction of such right by the Constitution or statutory laws of the State wherein the action is pending. The statute does not justify federal interference where a party is deprived of any civil right by reason of discrimination or illegal acts of individuals or judicial or administrative officers. If the alleged wrongs are permitted by officers or individuals the remedy is the prosecution of the case to the highest court of the State and then to the Supreme Court of the United States as the laws of the United States authorize. The statute contemplates that during the trial of a particular case, the state court will respect and enforce the right of the defendant

1. Clark v. State of Georgia (28971), Supreme Court of Georgia — Case No. 22,323, decided Jan. 30, 1964.
2. In Re MacNeil Bros. Co. (CCA Mass. 1958) 259 F. 2d 386; Westark Production Credit Ass'n v. Fidelity & Deposit Co., (D.C. W.D. Ark. 1951) 100 F. Supp. 52, 56; Rand v. State of Arkansas (D.C. W.D. Ark. 1961) 191 F. Supp. 20; Title 28, § 1447 (c), U. S. C.
3. Shamrock Oil Corp. v. Sheets, 313 U. S. 100; City of Birmingham, Ala. v. Croskey, 217 F. Supp. 947.

to the equal protection of the laws of the State or the constitutional laws of the United States. [4]

The duty to enforce and protect every right granted and secured by the United States Constitution rests equally upon State and Federal Courts. [5]

Considered in the light of the aforementioned authority, the petition for removal to this Court does not allege facts sufficient to justify the removal that has been effected.

Since the case was improperly removed to this Court, it is the duty of this Court to remand the same to the Superior Court of Fulton County, Georgia, [§ 1447 (c) Title 28, U. S. C.] and the defendants named in the above styled case are hereby required to report without delay to the Superior Court of Fulton County, Georgia, and there attend from day to day thereafter as may be ordered by said Superior Court.

It is therefore ORDERED, ADJUDGED and DECREED that the above styled case is hereby remanded

4. Hull v. Jackson County Circuit Court, (CCA Mich. 1943) 138 F. 2d 820; Rand v. State of Arkansas, supra, note 1; City of Birmingham, Ala. v. Croskey, supra, note 2; People of State of California v. Lamson, 12 F. Supp. 813; 2 Cyc. of Fed. Procedure, Sec. 3.82.
5. Gibson v. State of Mississippi, 162 U. S. 565, 40 L. Ed. 1075; Ex Parte Royall, 117 U. S. 241, 248, 29 L. Ed. 868 at p. 870; Synpp v. State of Ohio, 70 F. 2d 535.

to the Superior Court of Fulton County, Atlanta, Georgia.

This the 18th day of February, 1964.

BOYD SLOAN
United States District Judge

(Filed in Clerk's Office and a True Copy Certified, This February 19, 1964, B. G. Nash, Clerk. By Dalton K. Kirkpatrick, Deputy Clerk.)

APPENDIX B

Appeal from the United States District Court
for the Northern District of Georgia

Filed: March 12, 1964

In The United States Court Of Appeals
For The Fifth Circuit

Thomas Rachel, et al,

Appellants,

versus No. 21,354

The States of Georgria

Appellee.

Before TUTTLE, Chief Judge, WISDOM, Circuit Judge, and CARSWELL, District Judge.

PER CURIAM:

This Court having heretofore, in the case of Congress of Racial Equality v. City of Clinton, Louisiana, granted a stay of the order of remand returning the said case to the state courts of Louisiana, pending an appeal from such order of remand on the merits, we conclude that consistent with that order a stay should be granted to the appellants here.

The question of the appealability of an order of remand is presented in the C.O.R.E. case which will be promptly heard by this Court. We conclude that the effectiveness of the order of the District Court, dated February 18, 1964, remanding these cases to the Su-

perior Court of Fulton County should be delayed pending a determination of the appeal on the merits.

It is, therefore, ORDERED that the said order of February 18, 1964, be and the same is hereby stayed pending final disposition of this appeal on the merits or the earlier order of this Court.

This 12th day of March, 1964.

(Signed) ELBERT P. TUTTLE
ELBERT P. TUTTLE
United States Circuit Judge

(Signed) JOHN MINOR WISDOM
JOHN MINOR WISDOM
United States Circuit Judge

CARSWELL, District Judge, DISSENTING:

Orders of remand are not appealable under the affirmative language of the statute, nor have the courts before this held them so to be. The nature of the sufficient cause to disturb this universally applied rule.

I would, therefore, grant appellee's motion to dismiss this appeal.

APPENDIX C

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 21354

THOMAS RACHEL, ET AL,
Appellants,

versus

STATE OF GEORGIA,
Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

(March 5, 1965.)

Before TUTTLE, Chief Judge, BELL, Circuit Judge, and WHITEHURST, District Judge.

TUTTLE, Chief Judge: This is an appeal by the named appellant and 19 other persons charged with the violation of Georgia's so-called anti-trespass statute, Title 26 Georgia Code Annotated, Section 3005, from an order entered by the district court without a hearing remanding the cases for trial to the state court after they had been removed

by a petition for removal filed pursuant to Title 28 U.S.C.A. §1443(1) and (2) (the Civil Rights Removal Sections). Having held, in the case of *Congress of Racial Equality, et al. v. Town of Clinton, Parish of East Feliciana*, 5 Cir., 1964, ... F. 2d ...., that the enactment of the Civil Rights Act of 1964 resolved the question of appealability of remand orders as to cases removed to the Federal District Courts under Section 1443, *supra*,[1] we turn directly to the merits of the appeal.[2]

---

[1] Prior to the enactment of Section 901 of the Civil Rights Act of 1964, Title 28 U.S.C.A. §1447(b) on its face seemed to prohibit an appeal from an order of remand. It provided: "an order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise." Notwithstanding the provisions of that statute, however, a substantial question had been raised in the *CORE* case, supra, and in this case when this Court originally granted a stay of the remand order pending appeal whether the express provisions of 1447(b) applied to Civil Rights cases. We discussed this issue in the *CORE* case. This discussion need not be repeated by reason of the fact we have now determined that whether or not remand orders in such cases were appealable before the passage of the Civil Rights Act, the adoption of that Act by Congress forecloses the issue in favor of appealability.

The appellee's contention that this appeal is untimely has no merit. The notice of appeal was filed sixteen calendar days after the order appealed from, and it could only be considered untimely if the ten-day time limit of Fed. R. Crim. P. 37(a)(2) were applicable. It is absolutely clear, however, that Rule 37 has no application here.

The Supreme Court promulgated Rules 32 through 39, without submitting them to Congress, under the authority of the Criminal Appeals Rules Act. Act of Feb. 24, 1933, c. 119, 49 Stat. 904, as amended, 18 U.S.C. § 3772. The only power given under that Act was to prescribe rules of procedure "with respect to any or all proceedings *after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty* . . . ." (Emphasis added.) When it adopted the predecessor to Rule 37(a)(2), see 292 U.S. 661, 662, and when it promulgated that Rule in its present form, see 327 U.S. 825, the Supreme Court made it explicit that the Rule was meant to apply only to criminal appeals "after verdict, or finding of guilt . . . or plea of guilty."

The question whether the predecessor to Rule 37(a)(2) applied to a criminal appeal prior to verdict—in that case an appeal from an adjudication of criminal contempt—was

The question to be resolved on the merits of the appeal is whether the petition for removal in this case adequately stated a basis for removal under the indicated section of the removal statutes. Title 28 U.S.C.A. §1443, provides as follows:

"§1443. Civil rights cases

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place where it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or

squarely decided in *Nye v. United States*, 1941, 313 U.S. 28, 43-44. Rejecting the argument that the Criminal Rules applied to all cases that could be categorized as "criminal", the Court held that the history and the language of the order promulgating the Rule required that it be applied only "with respect to any or all proceedings *after verdict* in criminal cases." (Emphasis added.)

In 1940, Congress authorized the Supreme Court to prescribe rules of procedure in criminal proceedings "prior to and including verdict." Act of June 29, 1940, c. 445, 54 Stat. 688, as amended, 18 U.S.C. § 3771. Rules 1-31 and 40-60 were promulgated under the authority of this Act. It is clear that Rule 37(a)(2) can find no authority in this statute. Not only was it expressly prescribed under the "after verdict" enabling act, see 327 U.S. 825, but, as authorized in that act, it was never submitted to Congress. Under the "prior to verdict" enabling act, no rule could become effective unless submitted to Congress for its acquiescence. Only Rules 1-31 and 40-60 were so submitted. See 327 U.S. 824; Dession, The New Federal Rules of Criminal Procedure: II, 56 Yale L.J. 197, 230 (1947).

for refusing to do any act on the ground that it would be inconsistent with such law."

The meaning of this statute, passed in a package with the first post-bellum Civil Rights Act, Act of April 9, 1866, 14 Stat. 27, has been the subject of debate since its passage. It was originally construed to cover cases in which the defendant alleged his inability to obtain a fair trial due to such informal impediments as local prejudice. *State v. Dunlap*, 1871, 65 N.C. 491; see also *Ex parte Wells*, 3 Woods 128, quoted in *Kentucky v. Powers*, 1906, 201 U.S. 1, 27 (Bradley, J., on circuit).

Later, the view was taken that only formal impediments, stemming from State legislation, could give rise to such deprivations of equal civil rights as would allow a defendant to invoke federal jurisdiction by removal. *Kentucky v. Powers*, 1906, 201 U.S. 1. As this latter view was the latest Supreme Court pronouncement directly on the matter, the district court in the present case felt bound by it. In remanding the case to the State court, the district court states that "A criminal prosecution or a civil case under this statute [28 U.S.C.A. §1443] because of a civil right or the enforcement of such right must arise out of the destruction of such right by the Constitution or statutory laws of the State wherein the action is pending."

In delineating the scope of the civil rights removal statute for the first time, the Supreme Court placed great stress on the necessity that the denial of protected rights be made to appear in advance of trial, *Virginia v. Rives*,

1879, 100 U.S. 313. By way of illustration, the Court indicated that denials of equal rights at the hands of court officials, occurring during trial, could not be cured by removal but that such denials under state legislation could be safeguarded against in this manner. It has been argued that, under a realistic appraisal of the facts in a given case, the Supreme Court today would recognize the right to removal under §1443(1) even where no legislative denial of rights is shown. See Krieger, "Local Prejudice and Removal of Criminal Cases From State to Federal Courts," 19 St. John's L. Rev. 43 (1944); Note, "Local Prejudice in Criminal Cases," 54 Harv. L. Rev. 679, 685-86 (1941). Such a recognition by the Court thus would reemphasize the putative essence of *Virginia v. Rives*—that the denial of equal rights must be susceptible of demonstration before trial—and minimize the illustrative language in that case dealing with state legislation.

We have been asked by the appellants to anticipate such an interpretation of §1443 by the Supreme Court; however, there is no reason for us to reach that question in this case. This is so for two reasons. First, the petition in this case did allege the denial of protected rights by State legislation. Secondly, the passage of the Civil Rights Act of 1964 and its interpretation in *Hamm v. City of Rock Hill*, 1964, ... U.S. ...., provide a different, and narrower, ground on which this case may be disposed of.

After alleging the specific facts respecting the arrests of each of the 20 persons, including allegations that each of them was, when arrested, seeking food or accommoda-

tions at a restaurant or hotel, the petitioners alleged that each of their acts had been followed by special Grand Jury presentments charging them with violating the named section of the Georgia Code, and that the said presentments were pending in the Superior Court of Fulton County and were to be heard within a few days if not transferred. They then alleged the following:

"(3) By virtue of Title 28, United States Code Annotated, Section 1443(1) and (2), this Court has jurisdiction to hear and try the charges now pending against the petitioners. Removal is sought to protect the rights guaranteed to petitioners under the due process and equal protection clauses of Section 1, Fourteenth Amendment of the Constitution of the United States and to protect the right of free speech, association, and assembly guaranteed by the First Amendment of the Constitution of the United States.

"Moreover, petitioners are being prosecuted for acts done under color of authority derived from the constitution and laws of the United States and for refusing to do an act which was, and is, inconsistent with the Constitution and Laws of the United States.

"(4) The petitioners are denied and/or cannot enforce in the Courts of the State of Georgia rights under the Constitution and Laws of the United States providing for the equal rights of citizens of the United States and all persons within the jurisdiction thereof, in that, among other things, the State of Georgia by *statute*, custom,

> usage, and practice supports and maintains a policy of racial discrimination." (Emphasis added).

The district court apparently decided that, since the removal petition did not expressly allege that Section 26-3005 was unconstitutional on its face, the petition failed to allege adequately that "the destruction of" the right to equal protection granted by the United States Constitution was caused by "statutory laws of the State" of Georgia. The allegation contained in paragraph 4 of the petition for removal, quoted above, that petitioners were denied their rights under the constitution and laws of the United States because the State of Georgia "by statute . . . supports and maintains a policy of racial discrimination," however, clearly asserts the precise ground for removal that the trial court said was required. This would not be so, of course, if a petition for removal, unlike other pleadings under the Federal Rules of Civil Procedure, must contain something more than the bare bones allegation of the existence of a right. As to this matter, we have no doubt that the rules of notice pleading apply with as much vigor to petitions for removal as they do to other pleadings, which, according to Rule 8(f) of the Federal Rules of Civil Procedure, "shall be so construed as to do substantial justice." The statute requires that the petition for removal contain "a short and plain statement of the facts which entitle him or them to removal." 28 U.S.C.A. §1446. The Supreme Court has held that the removal must be effected by the filing of "a verified petition setting forth, agreeably to the ordinary rules of pleading, the particular

facts, not already appearing, out of which the right arises." *Chesapeake & Ohio Railway Co. v. Cockrell*, 1914, 232 U.S. 146, 151. It is plain, therefore, that the petition is to be construed "agreeably to the ordinary Rules of pleading" since in fact the petition for removal is the basis for the federal court's jurisdiction and it is a pleading of the facts necessary to vest jurisdiction in the federal court.

In *Allman v. Hanley*, 5 Cir., 1962, 302 F. 2d 559, 562, this Court said:

> "The absence of detailed grounds setting forth basis for removal is not fatal to defendants' right to remove. We think that the allegation that petitioners were officers acting under color of office in the employment of the United States was sufficient. Title 28, United States Code, Section 1446(a) requires only a short, plain statement of facts entitling a defendant to removal."

This is in line with this Court's construction of the Federal Rules of Civil Procedure relating to the liberality of pleadings under the rules. If a petition for removal states sufficient in the way of allegations to support proof of adequate grounds for removal, it is to be treated in the same manner as a complaint in federal court. As to such a pleading, this Court has frequently reiterated what we said in *Des Isles v. Evans*, 5 Cir., 1952, 200 F. 2d 614, 615, in quoting Moore's Federal Practice:

> "The courts have ruled time and again that a motion to dismiss for failure to state a claim

> should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim."

In that case we also quoted from an opinion by this Court in *De Loach v. Crowley's Inc.*, 5 Cir., 1942, 128 F. 2d 378, 380:

> "Under the Rules of Civil Procedure a case consists not in the pleadings, but the evidence, for which the pleadings furnish the basis. Cases are generally to be tried on the proofs rather than the pleadings."

We conclude, therefore, that this petition for removal adequately alleged that the appellants suffered a denial of equal civil rights by virtue of the statute under which they were being prosecuted in the State court. Unless there is patently no substance in this allegation, a good claim for removal under §1443(1) has been stated. That the allegation does not lack substance may be seen from a consideration of the Civil Rights Act of 1964, as construed by the Supreme Court.

Statutes of South Carolina and Arkansas, substantially the same as the Georgia statute involved here, were before the Supreme Court in *Hamm v. City of Rock Hill*, *supra*. Having upheld the constitutionality of Title II (Public Accommodations) of the Civil Rights Act of 1964 both as respects businesses serving interstate travelers and businesses of a more local nature a substantial part of whose products have moved in commerce, *Heart of*

Atlanta Motel, Inc. v. United States, 1964, ... U. S. ....; *Katzenbach v. McClung*, 1964, ... U.S. ...., the Court in *Hamm* held that prosecutions under State anti-trespass statutes may not stand if the denial of service or the request for removal from the premises was based upon an intent to discriminate against the arrested persons on account of race. The Court ruled that "The Civil Rights Act of 1964 forbids discrimination in places of public accommodation and removes peaceful attempts to be served on an equal basis from the category of punishable activities. Although the conduct in the present cases occurred prior to enactment of the Act, the still pending convictions are abated by its passage." The Court further said:

> "In short, now that the Congress has exercised its constitutional power in enacting the Civil Rights Act of 1964 and has declared that the public policy of our country is to prohibit discrimination in public accommodations as therein defined, there is no public interest to be served in the further prosecution of the petitioners. And in accordance with the long established rule of our cases they must be abated and the judgment in each is therefore vacated and the charges are ordered dismissed."

In the removal petitions in the cases pending before this Court, it is explicitly alleged that the arrests of appellants "were effected for the sole purpose of aiding, abetting, and perpetuating customs, and usages which have deep historical and psychological roots in the mores and

attitudes which exist within the City of Atlanta with respect to serving and seating members of the Negro race in such places of public accommodation and convenience upon a racially discriminatory basis and upon terms and conditions not imposed upon members of the so-called white or Caucasian race. Members of the so-called white or Caucasian race are similarly treated and discriminated against when accompanied by members of the Negro race." These are allegations of fact, which if true, place these prosecutions by the State of Georgia squarely within the principle announced by the Supreme Court in *Hamm v. City of Rock Hill.*

In its opinion, the Supreme Court pointed out that no State may now prosecute Negroes who were charged with having refused to leave premises in accordance with the provisions of the Georgia statute where the request to leave was based upon a policy of racial discrimination. The Court pointed out that Section 203 of the Act provides:

> "No person shall (a) withhold, deny or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured by Section 201 or 202, or (b) intimidate, threaten or coerce any person with the purpose of interfering with any right or privilege secured by Section 201 or 202, or (c) *punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured* by Section 201 or 202." (Emphasis in Supreme Court opinion).

The Court said, "On its face, this language prohibits prosecution of any person for seeking service in a covered establishment because of his race or color." The Court then proceeded to apply this prohibition to pending as well as prospective prosecutions. If therefore, the arrests and prosecutions of the appellants "were effected for the sole purpose of aiding, abetting and perpetuating customs . . . with respect to serving and seating members of the Negro race" in the respective restaurants "upon a racially discriminatory basis," as alleged, then under the holding of the Supreme Court these prosecutions will have to be abated.

Because of the Civil Rights Act of 1964, Title II, and its recent interpretation by the Supreme Court, we hold that the allegations of these petitions are sufficient to invoke federal jurisdiction under 28 U.S.C.A. §1443(1). That statute provides, as it has provided since its enactment in 1866, a federal forum in civil actions and criminal prosecutions to vindicate, in certain circumstances, rights "under any law providing for the equal civil rights of citizens of the United States." When the removal statute was originally enacted, the "law providing for . . . equal civil rights" most clearly contemplated was found in sections 1977 and 1978 of the Revised Statutes, *Strauder v. West Virginia*, 1879, 100 U.S. 303, 311. These sections formed part of the 1866 Civil Rights Act along with the removal provisions. In upholding the constitutionality of the removal statute, the Supreme Court made it clear that that act was merely one legitimate way for Congress to ensure the effectiveness of the substantive provisions of the civil rights laws. *Strauder v. West Virginia, supra,*

at 310-12. The Court said, "A right or an immunity, whether enacted by the Constitution or only guaranteed by it, even without any express delegation of power, may be protected by Congress. . . . And one very efficient and appropriate mode of extending such protection and securing to a party the enjoyment of the right or immunity, is a law providing for the removal of his case from a State court, in which the right is denied by the State law, into a Federal court, where it will be upheld. This is an ordinary mode of protecting rights and immunities conferred by the Federal Constitution and laws. Sec. 641 [now §1443(1)] is such a provision." See also *Virginia v. Rives*, 1879, 100 U. S. 313, 318.

From its inception, then, the civil rights removal statute has been, as its language plainly contemplates, an adjunct to the substantive civil rights statutes enacted by Congress. The history of the several codifications and recodifications of sections 1977 and 1978, of the several amendments and enlargements upon these seminal civil rights laws, and of the parallel codifications and recodifications of the removal statute which is presently 28 U.S.C.A. §1443(1) amply supports this view of the tenor of the statutory language. (The history of these provisions is easily traceable through annotations in U.S.C.A.). It can not be doubted that §1443(1) is today an adjunct of the Civil Rights Act of 1964. See *New York v. Galamison*, 2nd Cir., 1965, ... F. 2d ..., 33 U. S. Law Week 2389". Particularly is this so in light of the references to the provision of a federal forum on removal for the protection of substantive civil rights in the act itself, Title IX, §901, and in its legislative history. See House Judici-

ary Committee Report reprinted in BNA, The Civil Rights Act of 1964, pp. 286-87; remarks of Senator Dodd, 110 Cong. Rec. 6739 (daily ed. April 6, 1964).

Congress, while carving out rights and immunities in the area of civil rights, has provided a jurisdictional basis for efficiently and appropriately protecting those rights and immunities in a federal forum. The provision of this protective forum is not limited by the States' obligation, under the Supremacy Clause, to protect federally guaranteed civil rights as zealously as would a federal court. That there is such an obligation on State tribunals is true, and vital, but it is irrelevant here. Theoretically, there is no need for any federal jurisdiction at all—except that of the Supreme Court—because State courts are required to protect federally created rights. Nevertheless, the power of Congress to provide a federal forum also to protect such rights is undoubted. Such power was exercised in enacting §1443(1).

The federally guaranteed right and immunity here pertinent were elucidated by the Supreme Court in *Hamm v. City of Rock Hill, supra,* as follows:

> "[T]he language of §203(c) supports a conclusion that non-forcible attempts to gain admittance or remain in establishments covered by the Act, are immunized from prosecution, for the statute speaks of exercising or attempting to exercise a 'right or privilege' secured by its earlier provisions. The availability of the Act as a defense against punishment is not limited solely to those

> who pursue the statutory remedies. The legislative history specifically notes that the Act would be a defense to criminal trespass, breach of the peace and similar prosecutions."

Under the allegations of the petitions in the present case, these appellants have been denied, because of State legislation, "a right under . . . [a] law providing for the equal civil rights of citizens of the United States." They are entitled to a federal forum as provided for in 28 U.S.C.A. Sec. 1443(1) in which to prove the allegations. If the allegations are proved, then the federal court acquires jurisdiction for all purposes. Under normal circumstances the state prosecutions would then proceed in the federal court. Here, however, the finding of the jurisdictional fact immediately brings the *Hamm* case into play. The same fact determination requires dismissal rather than further prosecution in the District Court.[3]

Upon remand, therefore, the trial court should give appellants an opportunity to prove the allegations in the removal petition as to the purpose for the arrests and prosecutions, and in the event it is established that the removal of the appellants from the various places of public accommodation was done for racial reasons, then under authority of the *Hamm* case it would become the duty of the district court to order a dismissal of the prosecutions without further proceedings.

Concluding, as we do, that the petition for removal alleges sufficient grounds showing a denial of the civil

[3] In light of the view we have taken of this case, it is unnecessary to review the appellants' contention that they are also entitled to removal under 28 U.S.C.A. §1443(2).

rights of the appellants in the state courts by reason of the State statute, it follows that the order of remand was in error and it must be reversed and the case remanded to the district court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

BELL, Circuit Judge, concurring in part and dissenting in part:

I regret that I cannot concur altogether in the opinion of the majority. The reasoning preliminary to the holding therein seems to embrace the following steps. We begin with the jurisdictional base, i.e., the removal statute. 28 USCA, § 1443(1). Next, the case of *Kentucky v. Powers*, 1906, 201 U.S. 1, is cited for authority that the removal statute is limited to those situations where a state law gives rise to the deprivation of equal civil rights by reason of which a defendant seeks to invoke federal jurisdiction. Then the removal petition itself is construed, and the conclusion reached that appellants do indeed assert that they were being denied their equal civil rights in the state court because of a Georgia statute. The fact that the statute is nowhere specified is met by applying the philosophy of federal notice type pleading to the bare allegation of the removal petition, to the end of assuming that the petition referred to Georgia Code 26-3005, the anti-trespass statute.[1] It is also assumed that

[1] It shall be unlawful for any person, who is on the premises of another, to refuse and fail to leave said premises when requested to do so by the owner or any person in charge of said premises or the agent or employee of such owner or such person in charge. Any person violating

appellants will claim on hearing that the statute is either unconstitutional on its face or as applied by the state court to appellants. The unconstitutionality in application may be claimed on the holding of the Supreme Court in *Hamm v. City of Rock Hill*, 1964, ...U.S....., ... S.Ct. ...., 13 L.Ed.2d 300, in its retroactive application of the Civil Rights Act of 1964 for reason of national policy to the socalled sit-in cases. That case protects persons engaged in peaceable sit-ins in restaurants covered by the Act from prosecution.

Thus, the majority concludes that the removal petition may fairly be read as alleging a valid claim for removal under 28 USCA, § 1443(1). And up to this point, I am in agreement with the majority. That is, I agree that the removal petition may now be read to allege that appellants are unable to enforce in the Georgia courts the right, conferred by the Civil Rights Act of 1964 as construed by *Hamm v. City of Rock Hill*, to be free from prosecution under state trespass statutes for peaceful sit-in demonstrations. The fact is that appellants were being prosecuted under such a statute, viz., Ga. Code § 26-3005. Therefore I also agree that the District Court erred in remanding to the state court without a hearing. However, I wish to disassociate myself from that part of the holding as to how these cases are to be treated on remand to the District Court.

We should reverse and remand for a hearing on the question of jurisdiction. But, the majority states, and

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the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be punished as for a misdemeanor. (Ga. Laws 1960, p. 142)

this is where I disagree, that upon remand the trial court should give appellants the opportunity to prove their allegations as to the purpose of the arrests and prosecutions, and in the event the refusal of service in places of public accommodation was for racial reasons, then under the authority of the *Hamm* case it would become the duty of the District Court to dismiss the prosecutions. If this is all that remains for consideration on remand, the holding of the majority is tantamount to applying *Hamm v. Rock Hill* in all its sweep against trespass statutes, retroactively to the State of Georgia. It is, in effect, a holding that Georgia has applied and will continue to apply its trespass statute contrary to the teachings of the Supreme Court in *Hamm*, even though *Hamm* had not been decided when the cases were in the state courts and even though the state courts have not had an opportunity to deal with these cases in the light of *Hamm*. In dispensing with the requirement that appellants prove on remand that the Georgia courts will not accord them their rights under the *Hamm* decision, the theory of the majority must be that *Hamm* has tainted these prosecutions *ab initio*, and hence jurisdiction in the federal court has been established retroactively by the very fact that the prosecutions were ever commenced. This casual treatment of the Georgia courts is a striking departure from my concept of Federalism and from the duty which I think comity imposes upon us with regard to that system.

The fact is that the Supreme Court had never, before and absent *Hamm* and the 1964 Civil Rights Act, held the use of state trespass statutes under the circumstances

here presented to be unconstitutional. This was one of the problems that the Civil Rights Act sought to obviate. See the following cases where the question was pretermitted: *Griffin v. Maryland*, 1964, ... U.S. ....., 84 S.Ct. 1770, 12 L.Ed.2d 754; *Barr v. Columbia*, 1964, ... U.S. ....., 84 S.Ct. 1734, 12 L.Ed.2d 766; *Robinson v. Florida*, 1964, ... U.S. ....., 84 S.Ct. 1693, 12 L.Ed.2d 771; *Bell v. Maryland*, 1964, ... U.S. ....., 84 S.Ct. 1814, 12 L.Ed.2d 822; and *Bouie v. Columbia*, 1964, ... U.S. ....., 84 S.Ct. 1697, 12 L.Ed.2d 894. We recognized this fact in *Poole v. Barnett*, 5 Cir., 1964, 336 F.2d 267. It is now undoubtedly true that the 1964 Civil Rights Act and the *Hamm* decision have placed a gloss on state trespass statutes so that they may not be applied against those peaceably seeking service in restaurants covered by the Act, or against those whose prosecutions for such activity were pending at the time of the passage of the Act. However, in view of this gloss being of a supervening nature, I would give the Georgia court from whence these cases were removed a chance to apply the *Hamm* doctrine unless appellants can demonstrate on remand to the District Court that the Georgia court would not fairly accord them their rights under *Hamm*.

Thus, on remand the District Court should first determine just what appellants do claim under the present allegations of their notice type pleading. If they contend that the statute is unconstitutional in its application to them by the state, by virtue of the *Hamm* case or otherwise, then the question will arise whether the state in fact seeks to apply the statute in an unconstitutional manner. If it appears, and the burden would be on appellants to

show this, that the state will apply the statute contrary to the teachings of *Hamm*, the District Court should deny remand and retain the cases for disposition; otherwise, the cases should be remanded.

I doubt that appellants can point to any right that would be jeopardized by remand to the state court. The Supreme Court of Georgia has already applied *Hamm* to a group of sit-in convictions with the result of abating the conviction and ordering the cases dismissed. *Bolton, et al. v. State of Georgia*, No. 22,810, decided February 8, 1965. Such jeopardy as may be involved is jeopardy to our dual system of courts, federal and state. And a federal court should not lightly intrude into a sphere of activity left to state and local government under the Constitution: the maintenance of local order. Because the decision of the majority goes to the point of vesting jurisdiction in the federal court retroactively, a step further than the Supreme Court went in *Hamm*, I respectfully dissent.

WHITEHURST, District Judge, concurring in part and dissenting in part:

I concur in Judge Tuttle's opinion on the merits. However, the Notice of Appeal having been filed six days later than permitted under Rule 37(a)(2) of the Rules of Criminal Procedure, I would dismiss the appeal.

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APPENDIX D

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 21354

THOMAS RACHEL, ET AL,
Appellants,

versus

STATE OF GEORGIA,
Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

(April 19, 1965.)

ON PETITION FOR REHEARING.

Before TUTTLE, Chief Judge, BELL, Circuit Judge, and WHITEHURST, District Judge.

PER CURIAM: It is ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED.

BELL, Circuit Judge, concurring in part and dissenting in part:

I would grant the petition for rehearing to the extent noted in my dissent to the original opinion and for that purpose I dissent from the denial of the petition for rehearing; otherwise I concur.

WHITEHURST, District Judge, dissenting:

I would grant the petition for rehearing for the reason that the Appellate Court has no jurisdiction by virtue of Rule 37(a)(2) of the F.R.C.P.

PER CURIAM: It appearing that each of the members of the Court adheres to his views originally expressed in the several opinions heretofore filed, the petition for rehearing is DENIED.

Adm. Office, U. S. Courts—E. S. Upton Printing Co., N. O., La.

APPENDIX E

PERTINENT PARTS OF CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

AMENDMENT I, CONSTITUTION OF THE UNITED STATES

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

AMENDMENT XIV, CONSTITUTION OF THE UNITED STATES

"Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

SECTION 1443, TITLE 28, U. S. C.

"Section 1443. Civil rights cases

"Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

"(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

"(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law. June 25, 1948, c. 646, 62 Stat. 938.)"

SECTION 1446 (a), (c), (d), TITLE 28, U. S. C.

"Section 1446. Procedure for removal

"(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

" . . . . . .

"(c) The petition for removal of a criminal prosecution may be filed at any time before trial.

"(d) Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed."

SECTION 1447 (c), (d), TITLE 28, U. S. C.

"Section 1447. Procedure after removal generally

" . . . . . .

"(c) If at any time before final judgment it appears

that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

"(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise. June 25, 1948, c. 646, 62 Stat. 939, amended May 24, 1949, c. 139, Section 84, 63 Stat. 102.)"

SECTION 71, FORMER TITLE 28, U. S. C. (JUDICIAL CODE, SEC. 28)

". . . . Whenever any cause shall be removed from any State court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal from the decision of the district court so remanding such cause shall be allowed. . . . . ."

SECTION 74, FORMER TITLE 28, U. S. C. (JUDICIAL CODE, SEC. 31)

"When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person,

for any arrest or imprisonment or other trespasses or wrongs made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in said State court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next district court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the State courts shall cease, and shall not be resumed except as hereinafter provided. . . . . ."

SECTION 76, FORMER TITLE 28, U. S. C. (JUDICIAL CODE, SEC. 33)

"When any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law, ... the said suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court next to be holden in the district where the same is pending upon the petition of such defendant to said district court. . . . . ; and thereupon it shall be the duty of the State court to stay all further proceedings in the cause, and the suit or prosecution. . . . ."

ACT OF 1887, SECS. 2 AND 5
(24 STAT. 553, 555)

"Section 2. . . . . Whenever any cause shall be removed from any State court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed."

"Section 5. That nothing in this act shall be held, deemed, or construed to repeal or affect any jurisdiction or right mentioned either in sections 641, or in 642, or in 643, or in 722, or in title 24 of the Revised Statutes of the United States, or mentioned in section 8 of the act of Congress of which this act is an amendment, or in the act of Congress approved March 1, 1875, entitled 'An act to protect all citizens in their civil or legal rights.'"

ACT OF 1875, SEC. 5 (18 STAT. 472)

"Section 5. That if, in any suit commenced in a circuit court or removed from a State court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, ... , the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed as justice may require,

and shall make such order as to costs as shall be just; but the order of said circuit court dismissing or remanding said cause to the State Court shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be."

ACT OF 1866, SEC. 3 (14 STAT. 27, 28)

"An Act to protect all persons in the United States in their Civil Rights, and furnish the means of their vindication.

"Section 3. And be it further enacted, That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offenses committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the right secured to them by the first section of this act; and if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court, against any such person, for any cause whatsoever, or against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act or the act establishing a Bureau for the relief of Freedmen and Refugees, and all acts amendatory thereof, or for refusing to do any act upon the ground that it would be inconsistent with this act, such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the 'Act relating to habeas corpus and regulating

judicial proceedings in certain cases,' approved March three, eighteen hundred and sixty three, and all acts amendatory thereof. . . . . ."

REVISED STATUTES, TITLE XIII, THE JUDICIARY, SEC. 641

"When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs, made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid; or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution, may, upon the petition of such defendant, filed in said State court, at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next circuit court to be held in the district where it is pending. Upon the filing of such petition all further proceeding in the State courts shall cease, and shall not be resumed except as hereinafter provided. . . . . But if, without such refusal or neglect of said clerk to furnish such copies and proof thereof, the petitioner for removal fails to file copies in the circuit court as herein provided, a certificate, under the seal of the circuit court, stating such failure, shall be given, and upon the production thereof

in said State court, the cause shall proceed therein as if no petition for a removal had been filed." (Note: No mention made here of remand orders, except upon failure to file copies of proceedings in circuit court, or of the right to appeal a remand order.)

RULE 37 (a) (2), TITLE 18, U. S. C.

"Rule 37. Taking Appeal; and Petition for Writ of Certiorari

"(a) . . . . . .

"(1) . . . . . .

"(2) Time for Taking Appeal. An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from."

RULE 45 (a), TITLE 18, U. S. C.

"Rule 45. Time

"(a) Computation. In computing any period of time the day of the act or event after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a holiday. When a period of time prescribed or allowed is less than 7 days, intermediate Sundays and holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday."

RULE 73 (a), TITLE 28, U. S. C.

"Rule 73. Appeal to a Court of Appeals

"(a) When and How Taken. When an appeal is permitted by law from a district court to a court of appeals the time within such an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry, ..."

GEORGIA CODE ANNOTATED, 26-3005

"26-3005. Refusal to leave premises of another when ordered to do so by owner or person in charge. — It shall be unlawful for any person, who is on the premises of another, to refuse and fail to leave said premises when requested to do so by the owner or any person in charge of said premises or the agent or employee of such owner or such person in charge. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be punished as for a misdemeanor. (Acts 1960, p. 142.)"

RULE 54 (a) (1), (b) (1), TITLE 18, U. S. C.

"RULE 54. Application and Exception.

"(a) Courts and Commissioners.

"(1) Courts. These rules apply to all criminal proceedings in the United States District Courts, which include the District Court for the Territory of Alaska, the District Court of Guam and the District Court of the Virgin Islands; in the United States Courts of Appeals; and in the Supreme Court of the United States . . . ."

"(b) Proceedings.

"(1) Removed Proceedings. These rules apply to criminal prosecutions removed to the United States district courts from state courts and govern all procedure after removal, except that dismissal by the attorney for the prosecution shall be governed by state law."

ACT OF JUNE 25, 1948, c. 645, 62 Stat. 683, p. 845

"Section 3732. Taking of Appeal—Notice—Time (Rule) See Fed. Rules of Crim. Procedure, Rule 37 (a)."

CIVIL RIGHTS ACT OF 1964

§201:

"(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce . . .

* * * * * * * * *

"(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment . . .

"(c) The operations of an establishment affect commerce within the meaning of this title if . . . it serves or offers to serve interstate travelers . . ."

§203:

"No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured by section 201 or 202, or (b) intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by section 201 or 202, or (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 201 or 202."

APPENDIX F

United States Court of Appeals
FOR THE FIFTH CIRCUIT

October Term, 1964

No. 21354

D. C. Docket No. 23,869

THOMAS RACHEL, *et al.*,

Appellants,

versus

STATE OF GEORGIA,

Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

Before TUTTLE, Chief Judge, BELL, Circuit Judge, and WHITEHURST, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellee, State of Georgia, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"BELL, Circuit Judge, concurring in part and dissenting in part"

"WHITEHURST, District Judge, concurring in part and dissenting in part"

March 5, 1965

Issued as Mandate:

APPENDIX G

United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 21354

THOMAS RACHEL, *et al.*,

Appellants,

versus

THE STATE OF GEORGIA,

Appellee.

ON CONSIDERATION OF THE APPLICATION of the appellee in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable appellee to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

DONE AT NEW ORLEANS, LA., this 27th day of April, 1965.

/s/ ELBERT P. TUTTLE
Chief Judge.

(ORIGINAL FILED APRIL 27, 1965)

CERTIFICATE OF SERVICE

GEORGIA, FULTON COUNTY

I, J. Robert Sparks, of counsel for the State of Georgia, Petitioner, certify that I have this day served copies of the foregoing Petition for Writ of Certiorari, and Appendices, upon Respondents, by depositing in the United States Post Office in Atlanta, Georgia two copies of same in an envelope addressed to Donald L. Hollowell and Howard Moore, Jr., Esquires, Attorneys at Law, 859½ Hunter Street, N. W., Atlanta, Georgia 30314, and two copies of same in an envelope addressed to Jack Greenberg, Esquire, Attorney at Law, 10 Columbus Circle, New York, New York 10019, counsel of record for Respondents, with sufficient first class postage affixed thereto, plus air mail postage for Mr. Greenberg's copies.

This 14th day of May, 1965.

J. ROBERT SPARKS
Assistant Solicitor General
Atlanta Judicial Circuit